THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Casey Edwards, ... Petitioner,

v.

The State of South Carolina, ... Respondent,

RETURN TO PETITION FOR ORIGINAL JURISDICTION

The State of South Carolina does not object to this Court's considering this case in its original jurisdiction, but the State reserves all claims and defenses that it may have as to this matter. The State briefly notes the following concerns about this suit for the Court's consideration.

Although citizens and public officials have a high degree of interest in issues concerning the "stimulus" money, this suit may have fundamental problems of parties and timing. In addition to questions that may exist as to the standing of this Petitioner[1],

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[1] Petitioner may, herself, lack standing to sue now. While this Court has held that standing may be found when issues are of public importance (*Davis v. Richland County Council*, 372 S.C. 497, 642 S.E.2d 740 (2007)), Petitioner makes only the most general allegations regarding herself as a public high school student and the affect of failure to accept the stimulus funds on students. As an eighteen year old student, Petitioner will likely graduate before the next fiscal year which would be the earliest budget year for any appropriation of stimulus funds at issue.

Petitioner may have failed to join proper defendants. This action addresses the powers of the Governor and the General Assembly as to significant public matters without including either the Governor or a representative of the General Assembly as parties. *See*, Rules 12(b)(7) and 19, SCRCP.[2] Moreover, this suit may be moot as to certification because the Governor already appears to have made the certification required by the American Recovery and Reinvestment Act of 2009 (ARRA), P.L. 111-5.[3] At the same time, this action may not be ripe as to other issues regarding the legislature because the General Assembly has not attempted to accept the funds by concurrent resolution or otherwise and has not appropriated the ARRA Funds at issue or any other funds.[4] The timing now simply may not be right to shift issues from public policy debate to the Courtroom.

Substantively, the State's position is expressed in the Opinion of the Attorney General of March 31, 2009 [Petitioner's Attachment 4]. The Recovery Act (ARRA) cannot be interpreted without necessarily considering the impact of that interpretation upon the State Constitution and the General Assembly's powers thereunder to legislate and appropriate

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[2] The State does not, at this time, move for the joinder of additional defendants, but notes that the failure to join other defendants may be a defect in this suit that may need to be remedied.

[3] "This Court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Byrd v. Irmo High School* 321 S.C. 426, 468 S.E.2d 861, 864 (1996).

[4] "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from this dispute of a contingent, hypothetical or abstract character. . . .The Declaratory Judgment Act is not properly invoked for an advisory opinion to be put on ice by the plaintiff for use if the defendants or the applicant reach the occasion which might demand it . . . ." *Orr v. Clyburn*, 277 S.C. 536, 290 S.E.2d 804, 807 (1982).

funds. An interpretation of the federal law which would constitute an infringement of the State's sovereign powers in contravention of the Tenth Amendment must be avoided.

While Congress possesses broad authority under its spending power, that authority is not unlimited. Conditions for receipt of federal funds must be unambiguous and the State cannot be coerced into accepting funds. *South Dakota v. Dole*, 483 U.S. 203 (1987). See also *West Va. v. U.S. Dept. of Health and Human Services*, 289 F.3d 281, 291 (4th Cir. 2002) (opinion of Traxler, J.) [federal statutes may not threaten loss of an entire block of federal funds upon a relatively minor failing by State]. As stated in *N.Y. v. U.S.*, 505 U.S. 144, 168 (1992), the State's residents retain "the ultimate decision as to whether or not the State will comply" with Congressional conditions.

As this Court emphasized in *Joytime Dist. and Amusement Co. v. State*, 338 S.C. 634, 642, 528 S.E.2d 647 (1999), South Carolina has a representative form of government. The people ordinarily speak through enactments of the General Assembly, which are "*ipso facto* binding" for the State unless unconstitutional. By comparison, other officers, such as the Governor, in order "to act at all," must have particular power expressly delegated by the Constitution or statute. *McKenzie v. Ramsay*, 1 Bail. 457, 17 S.C.L. 457 (1830).

Congress, however, can neither bestow upon the Governor powers not given by the Legislature, nor authorize the Legislature to bind the State through concurrent resolution, instead of a duly enacted law passed pursuant to constitutional processes. A federal funding program "cannot and does not change the South Carolina Constitution and statutory law." *Creative Displays, Inc. v. S.C. Highway Dept.*, 272 S.C. 68, 73-74, 248 S.E.2d 916 (1978). Pursuant to the Constitution, binding legislative action is by Act or Joint Resolution. *See*,

Art. III, § 18; Art. IV, § 21. While often confused with a joint resolution, a concurrent resolution does not "give the action of the Legislature the force of law." *Stolbrand v. Hoge*, 5 S.C. 209 (1874). A concurrent resolution cannot replace a properly enacted statute or joint resolution. *State v. Cola. Water Power Co.* 90 S.C. 568, 74 S.E. 26 (1912).

Consistent with these various constitutional requirements is Art. X, § 8, requiring that money be drawn from the Treasury only by "appropriation made *by law*." (emphasis added). The appropriations power is exclusively a legislative function. Funds cannot be spent without an appropriation and must be spent as appropriated. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623 (2002); see also, § 11-35-45; § 2-65-20. *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 295 S.E.2d 633 (1982) holds that these constitutional requirements are equally applicable to federal funds. As the Court recognized in *McInnis*, the application and receipt of federal funds is ultimately a "policy matter[ ] ... in the province of the General Assembly ...." *Id.* at 314. The March 31, 2009 Opinion of the Attorney General discussed this in detail, referencing a number of decisions of this Court, including *Condon v. Hodges, supra, McInnis, supra, Gilstrap v. S.C. Budget and Control Board*, 310 S.C. 210, 423 S.E.2d 101 (1992) and *Grimball v. Beattie*, 174 SC 422, 177 S.E. 668 (1934). *See also Shapp v. Sloan*, 391 A.2d 595 (Pa. 1978) [application of state Constitution's requirement of an appropriation to federal funds does not violate the federal Constitution]. The Attorney General's Opinion, recognizing that this situation may be unique from other cases decided by this Court, stated as follows:

> [i]n cases such as *Grimball, Gilstrap*, and *Condon v. Hodges, supra*, our Supreme Court has on previous occasions resolved conflicts between the legislative and executive branches by giving force to the legislative

> appropriation, thereby requiring the executive branch to faithfully execute the law. Here, however, federal law bestows broad discretion upon the Governor, as the chief executive of the State, to decide whether or not to apply for and utilize these funds. Thus, this situation may be perceived as somewhat distinct from the previous cases decided by our courts, referenced above. Moreover, here, a court would need to resolve the Tenth Amendment questions present. *See*, n. 1 above. Nevertheless, while there are distinctions here not present in previous cases, we advise that *McInnis* strongly indicates our Supreme Court would not treat federal funds differently from state generated funds, and would thus require a legislative appropriation in order to expend such funds. See also, § 11-35-45 ["All federal funds received must be deposited in the State Treasury, if not in conflict with federal regulations, and withdrawn from the State Treasury as needed, as that provided for the disbursement of state funds."]; *Shapp v. Sloan, supra* ["Appellants have failed to prove their basic premise that funds not raised under general state law are constitutionally differentiated from other funds in the state Treasury, and thus constitutionally beyond the scope of the General Assembly's authority."]. We further advise that earlier precedents of our Supreme Court, referenced above, have required the executive to "faithfully execute" any state law or appropriation enacted by the General Assembly relative to the expenditure of state or federal funds. *See also, County of O'Neida v. Berle*, 404 N.E.2d 133 (N.Y. 1980) [state Constitution bestows *no implied power* in the executive branch to impound funds or reduce appropriations]; *Community Action Programs v. Ash*, 365 F.Supp. 1355 (D. N. J. 1973) [once funds are appropriated for a specific program, "the Executive Branch has a duty to spend them."].

We emphasize that "[u]nder well established principles of statutory construction, courts should not presume that Congress has intruded upon a core area of state sovereignty unless the relevant federal statute is clear and unambiguous." *Nat. Assn. of Regulatory Utility Commr's. v. FERC*, 475 F.3d 1277, 1289 (D.C. Cir. 2007). The Recovery Act should not, in our view, be interpreted in such a way that a "concurrent resolution" replaces a "joint resolution" or Act of the Legislature. Thus, even assuming *arguendo* that the Court is inclined to deem the "Clyburn Amendment" to be controlling, which we dispute, any ambiguity in the term "concurrent resolution" – often confused, and "frequently used

synonymously" with a "joint resolution," see *Statutes and Statutory Construction* (6th ed.), § 29:6 – should be resolved consistently with the state Constitution so that the force of law is required. Moreover, as the March 31, 2009 Opinion emphasized, "if Recovery Act funds are to be expended by South Carolina, the Legislature must, pursuant to state Constitutional requirements, authorize their expenditure by appropriation."

This lawsuit is not ripe, and the Clyburn amendment does not authorize bypassing South Carolina's constitutional processes. In sum, if this Court sees fit to grant original jurisdiction in this case, we ask the Court to protect the state Constitution by construing the Recovery Act consistently with the fundamental principles of state sovereignty.

The State may further develop these issues and add others in briefing should this Court accept this case for consideration in its original jurisdiction.

Respectfully submitted,

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By: 

April 20, 2009 ATTORNEYS FOR THE STATE